

LVC Corporation
d/b/a Wild Cheri
4884 Crawfordsville Road
Indianapolis, Indiana 46224

RR49-15903
District 6

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Permittee, LVC Corporation, d/b/a Wild Cheri, 4884 Crawfordsville Road, Indianapolis, Indiana 46224 (Permittee) is the holder of a type 210, Alcohol and Tobacco Commission (ATC) permit, #RR49-15903. On March 5, 2002, permittee filed its request for a Sunday sales permit, a Type 220, and that application was assigned to the Marion County Local Board (LB) for hearing.¹ The LB heard the Sunday Sales request on September 3, 2001, and on that same day, voted 2 – 1 to deny the application.² The ATC adopted the recommendation of the LB on September 17, 2002, and denied the Sunday sales application.

The permittee filed a timely notice of appeal and the matter was assigned to the ATC Hearing Judge, Mark C. Webb (HJ). The HJ assigned the matter for hearing on February 21, 2003, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The permittee was represented by Joseph F. Quill. There were no remonstrators present.³ The HJ took judicial and administrative notice of the entire contents of the file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

II. EVIDENCE PRESENTED AT THE ATC HEARING⁴

¹ In Marion County, due to the 1969 creation of UNIGOV, the separately incorporated towns of Speedway, Beech Grove and Lawrence each have their own mayoral appointee to the LB who sits in place of the Indianapolis mayor's appointee for hearings on applications of permittees located within those towns. Thus, this case was heard by the other members of the Marion County LB who hear every application filed in the county, along with the Speedway mayor's appointee who sat in place of the Indianapolis mayor's appointee.

² LB members Robert Spear and John Sneyd, the Speedway mayoral appointee, voted against the proposal; Spear, because permittee failed to show a need or desire for the services at that location; and Sneyd, because permittee did not meet the minimum food requirements of IC 7.1-3-16.5-2. Alexander Ray, the State Excise Police appointee to the LB voted in favor of the request. Regular LB member Timothy Sadler was not present and did not vote in this case.

³ The record before the LB reveals that Van Barteau, a Speedway resident and the Indianapolis mayoral appointee to the LB remonstrated as a private citizen on the sole basis that recent amendments to IC 7.1-4-4.1-9 did not change the minimum food requirements contained in IC 7.1-3-16.5-2 for those establishments wishing to sell alcoholic beverages on Sunday. Even though Barteau failed to attend the ATC hearing, the HJ will address all issues raised at the LB on the merits.

⁴ It is the normal practice of this HJ to include a summary of evidence submitted before the LB, in determining whether relief from the LB decision is warranted under IC 7.1-3-19-11. However, in this

A. WITNESSES

The following witnesses testified at the appeal hearing in support of the permittee:

1. Doug Boris, general manager of LVC Corporation. He has been the GM since approximately March, 1991. He testified that permittee is an adult entertainment cabaret type club located in an area which is approximately 90% commercial, with a trailer park located to the northwest of the property. He admitted that permittee does not qualify for a Sunday sales permit under IC 7.1-3-16.5-2 as they do not have retail food sales in the amount of \$100,000 annually. Instead, permittee is relying on the recent amendments to IC 7.1-4-4.1-9 allowing for a Sunday sales permit for a retailer who does not meet the minimum food requirements of IC 7.1-3-16.5-2 to pay an annual fee of \$1500 for the permit privileges.⁵ He testified that upon payment of the \$1500 application fee, that LVC meets all criteria necessary to hold a Sunday sales permit. He further stated that during the instant application process, permittee notified by mail all property owners within 500 feet of the premises, as well as all churches and schools within 1000 feet, sending out approximately 52 notices. He said the club has been in existence since 1988, and there have been no remonstrations against any of its annual renewals. He added that the Harem House, Babes East and Babes West, all located within Marion County, were given Sunday sales permits based on IC 7.1-4-4.1-9(d)(2) and he felt that it was only fair that LVC receive similar treatment.⁶
2. Gary Basham, owner of LVC Corporation and permit premises. He testified that when he bought the premises, he got rid of the public nuisance elements, has made improvements to the location, and has made a significant effort to reach out to local officials in the community. He testified that he has an excellent working relationship with the Speedway Police Department and other law enforcement agencies and feels that his reputation with those agencies is good.

B. EXHIBITS

instance, it is sufficient to state that the same evidence presented to the ATC was presented to the LB and this case turns on the legal impact of the 2001 statutory changes to IC 7.1-4-4.1-9(d).

⁵ IC 7.1-4-4.1-9(d)(2), as added by PL 204-2001, Sec. 43. Those permittees who meet the minimum food requirements of IC 7.1-3-16.5-2 pay an annual fee of only \$250. IC 7.1-4-4.1-9(d)(1).

⁶ Similar treatment by another permittee does not, by itself, show, and will never be sufficient, standing alone, constitute adequate grounds, that a permittee is automatically entitled to the permit sought. All permits are judged on their own individual merit and the result turns on the facts and circumstances of each case. In addressing Boris's contention, both the Harem House and Babes East received Sunday sales permits under the authority of IC 7.1-4-4.1-9(d)(2). Babes West qualified under IC 7.1-4-4.1-9(d)(1), meeting the minimum food requirements of IC 7.1-3-16.5-2.

The following exhibits were introduced at the ATC hearing in support of permittee:

1. List of individuals, businesses and addresses notified by permittee at the direction of the LB in the course of the application process.

III. FINDINGS OF FACT

1. The Permittee, LVC Corporation, d/b/a Wild Cheri, 4884 Crawfordsville Road, Indianapolis, Indiana 46224 (Permittee) is the holder of a type 210, Alcohol and Tobacco Commission (ATC) permit, permit #RR49-15903. (ATC Hearing).
2. Said permit was first issued on October 4, 1988 and has been renewed annually thereafter. (ATC Hearing).
3. Permittee seeks a Type 220 Sunday sales permit pursuant to IC 7.1-4-4.1-9(b)(2) which allows for such a permit upon the annual payment of \$1500 if one does not meet the minimum food requirements of IC 7.1-3-16.5-2. (LB Hearing; ATC Hearing).
4. Permittee does not meet the minimum food requirements of IC 7.1-3-16.5-2. (LB Hearing).
5. Permittee has tendered the required \$1500 annual fee in support of the requested permit. (ATC Hearing; ATC File).
6. No remonstrators appeared at either hearing before the LB or the ATC objecting to the proposed permit on any grounds pursuant to the provisions of 905 IAC 1-27.⁷ (LB Hearing; ATC Hearing).
7. There was no evidence presented as to whether there was a need for such services as the location or whether the neighborhood or community desired such services. (LB Hearing).
8. Permittee complied with the notice requirements of the Marion County LB and sent written notice of the application of the permit to all residents and business owners within 500 feet of the licensed premises. (ATC Hearing).
9. Similar businesses seeking Sunday sales permits pursuant to IC 7.1-4-4.1-9(d)(2) have been granted by the LB under ATC records identical to that presented in this case. (ATC Files).

IV. CONCLUSIONS OF LAW

⁷ The ATC file reveals two letters received by the ATC following the LB hearing objecting to the request sought herein. The letters are from Jeff Hartman, President of the Speedway Town Council, and Jacklyn Corcoran, President, Old Speedway City Neighborhood Association, Inc., respectively. In addition to the fact that these individuals or organizations failed to offer any testimony before either the LB or the ATC, neither letter contains any facts or other supporting information showing that the members of these organizations took any official action authorizing these communications. Neither letter was served upon permittee or its counsel, giving them no reasonable opportunity to respond. For these reasons, the HJ accords them little weight.

1. The Permittee, LVC Corporation, d/b/a Wild Cheri, 4884 Crawfordsville Road, Indianapolis, Indiana 46224 (Permittee) is the holder of a type 210, Alcohol and Tobacco Commission (ATC) permit, permit #RR49-15903, said permit having first been issued on October 4, 1988 and having been renewed annually thereafter.
2. IC 7.1-3-16.5-2 provides for the issuance of a Sunday sales permit for an establishment which operates more than seven months per year only if that establishment has at least \$100,000 of gross retail sales in food annually, or \$100,000 of food and beverage sales annually, where at least \$50,000 is from the sale of food.
3. IC 7.1-4-4.1-9(d)(1) provides that the cost of a permit for a retailer who sells alcohol on Sunday under the authority of IC 7.1-3-16.5-2 is \$250 annually.
4. IC 7.1-4-4.1-9(d)(2) provides that the cost of a permit for a retailer who sells alcohol on Sunday not under the authority of IC 7.1-3-16.5-2 is \$1500 annually.
5. To be “not under the authority of IC 7.1-3-16.5-2” means to seek a Sunday sales permit without meeting the minimum food requirements of that statute.
6. The purpose of IC 7.1-4-4.1-9(d)(2) is to provide a way, at an increased cost, for a permittee to qualify for lawful Sunday sales of alcoholic beverages without meeting the minimum food requirements of IC 7.1-3-16.5-2.
7. Before the passage of PL 204-2001, the only way to qualify for a Sunday sales permit was to meet the minimum food requirements of IC 7.1-3-16.5-2.
8. An important rule of statutory construction is that there is a strong presumption that the legislature, in enacting a particular piece of legislation is aware of existing statutes on the same subject. *Morgan County R.E.M.C. v. Indianapolis Power & Light Co. (1973)*, 261 Ind. 323, 302 N.E.2d 776.
9. Another fundamental rule of statutory construction is that a statutory amendment changing a prior statute indicates a legislative intention that the meaning of the prior statute has been changed. *Indiana Alcoholic Beverage Commission v. Osco Drug, (1982)*, Ind.App., 431 N.E.2d 823.
10. A legislative amendment changing a prior statute raises a presumption that the legislature intended to change the law unless it appears that the amendment was made only to express the original intention of the legislature more clearly. *Daubenspeck v. City of Ligonier (1962)* 135 Ind.App. 565, 183 N.E.2d 95, transfer denied, 245 Ind. 20, 191 N.E.2d 100.
11. The amendment to IC 7.1-4-4.1-9 contained within PL 204-2001 does not appear to have been made to express the original intention of the legislature more clearly.
12. Where possible, every word in a statute must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute. *MDM Inv. v. City of Carmel, (2000)*, Ind.App., 740 N.E.2d 929, 934.
13. To hold that, irrespective of PL 204-2001, an applicant for a Sunday sales permit must still meet the minimum food requirements of IC 7.1-3-16.5-2 is to render IC 7.1-4-4.1-9(d)(2) meaningless.
14. Pursuant to IC 7.1-4-4.1-9(d)(2), a permittee who wishes to obtain a Sunday sales permit but who does not qualify for such a permit under the minimum food requirements of IC 7.1-3-16.5-2 may obtain such a permit for an annual fee of \$1500 without meeting such minimum food requirements.

15. The issue of whether there exists a need for such services at a particular location or whether the neighborhood or community desires to receive such services must be first raised by remonstrators.
16. A permittee does not bear the burden of showing that the neighborhood or community desires to receive such services at a particular location if no objection to the permit in question on that basis has been previously raised.⁸
17. In the absence of an objection by remonstrators to a particular permit at a particular location, it will be presumed that the community or neighborhood desires to receive such services at a particular location.
18. Only if there is a remonstrance regarding location issues enumerated in 905 IAC 1-27-4 is a permittee obligated to present some evidence as to the need for such services or that the neighborhood or community desires to receive such services at a particular location.
19. The issue of need for such services or whether the neighborhood or community desires to receive such services at a particular location cannot be raised *sua sponte* by a local board.
20. Local Boards hearing alcoholic beverage applications function in a *quasi*-judicial capacity. *Pettit v. Indiana Alcoholic Beverage Commission*, (1987), *Ind.App.*, 511 N.E.2d 312.
21. Due process requires that those functioning in a *quasi*-judicial capacity be impartial. *Hearing & Speech Clinic v. Ind. Dept. of Welfare*, (1984), *Ind.App.*, 466 N.E.2d 462.
22. A local board's raising of an issue which can constitute a defense on the merits and would be expected to be raised by remonstrators where such issue has not been raised by any remonstrators, calls into question the impartiality of the LB in question.
23. Because no remonstrators raised the issue, permittee in this case did not have the burden of showing that there was a need for such services at its location or that the neighborhood or community desired to receive such services at that location.
24. Having tendered the \$1500 annual fee for the Sunday sales permit, permittee is legally entitled to said permit, and the LB's denial of this request under these circumstances was an abuse of discretion or otherwise not in accordance with the law.
25. The LB's denial of this request under these circumstances is also arbitrary and capricious, because similar establishments have met the identical qualifications of IC 7.1-4-4.1-9(d)(2), and have had such permits granted by the LB under the same facts as presented here.
26. The ATC may reverse the decision of the LB if it finds on appeal that the LB's action was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority,

⁸ Placing such a burden on a permittee in the absence of any prior opposition to the location would result in unnecessary additional expenses to the permit process, and would negate the importance of the notice requirements and the duty of residents and business owners in a given area to publicly respond to the application. It would also require the Commission to utilize additional time and resources in evaluating an aspect of the process to which no party has raised an objection.

limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence.⁹

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Marion County LB to deny the application in this matter was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and is hereby reversed. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Applicant and against the LB and the appeal of Permittee, LVC Corporation, d/b/a Wild Cheri, 4884 Crawfordsville Road, Indianapolis, Indiana 46224 for application of this Type-220 Sunday sales permit, permit #RR49-15903, is granted and the application of said permit applied for is hereby granted.

DATED: _____

MARK C. WEBB, Hearing Judge

⁹ (IC 7.1-3-19-11)